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# No. 754

IN THE

## Supreme Court of the United States

OCTOBER TERM 1960

On Appeal from the Supreme Court of Ohio.

FAMILY FAIR, INC. AND BERTON KAPLAN,
Appellants,

vs.

STATE OF OHIO,
Appellee.

## MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

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FAMILY FAIR, INC. AND BERTON KAPLAN,
Appellants,

vs.

STATE OF OHIO,
Appellee.

## MOTION TO DISMISS APPEAL

The State of Ohio, appellee in the above entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss this appeal on the grounds that it does not present a substantial federal question and the judgment of the Supreme Court of Ohio rests on an adequate non-federal basis.


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## BRIEF IN SUPPORT OF MOTION TO DISMISS

### INTRODUCTION

This motion is directed to the appeals and jurisdictional statement filed heretofore by the appellants, and it is requested that it be filed in both of the above entitled cases.

### QUESTIONS PRESENTED

The following questions are presented by this motion:

1. The Ohio statute in question, Section 3773.24 Revised Code, is a proper exercise of the police power of the Ohio General Assembly preserving the health and welfare of the people of this state, and makes a classification of pursuits which is not violative of the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. The Ohio statute in question Section 3773.24 Revised Code, is not violative of the First and Fourteenth Amendments to the Constitution of the United States as an infringement upon the religious freedom of the people of this state, nor does it constitute the establishment of any religion or cause any discrimination between persons of different religious beliefs.

## STATEMENT OF THE CASE

This case is an appeal from a judgment of the Supreme Court of Ohio, dismissing an appeal as of right for the reason no debatable constitutional question was involved in the case. The appellants upon trial in the Municipal Court of Toledo, Ohio were found guilty of a violation of Section 3773.24 Revised Code and judgment entered against them. This judgment was affirmed on an appeal to the Court of Appeals of Lucas County, Ohio. The appellant, Family Fair, Inc., operates a retail establishment located in the City of Toledo, Ohio and on the Sunday in question the evidence adduced established that the premises operated by the appellant was engaged in the transaction of a retail business. The appellant, Berton Kaplan, was the manager of the premises on the Sunday in question.

## ARGUMENT

### I

**The Ohio Statute in Question, Section 3773.24 Revised Code, is a Proper Exercise of the Police Power of the Ohio General Assembly Preserving the Health and Welfare of the People of this State, and Makes a Classification of Pursuits Which is not Violative of the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.**

The Supreme Court of Ohio has consistently held that the General Assembly of Ohio has the constitutional authority to enact legislation in the exercise of its police power to regulate or prohibit commercial activity or labor on Sunday in the interest of the preservation of the health, safety and welfare of the people of this State. The Supreme Court of Ohio has predicated this conclusion upon the reason that the policy of such Sunday legislation is established by the observed fact, derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well-being, morally and physically, of the citizens of this state and any people. *State of Ohio v. Kidd*, 167 Ohio St. 521, Appeal to the Supreme Court of the United States dismissed, no substantial federal question, 358 U. S. 131, *State of Ohio v. Powell*, 58 Ohio St. 324, *Bloom v. Richards*, 2 Ohio St. 387. See also *Soon Hing v. Crowley*, 113 U. S. 703, 705; *Hennington v. Georgia*, 163 U. S. 299; *Petit v. Minnesota*, 177 U. S. 164.

The purpose of Section 3773.24 Revised Code is not to protect one business from another, or to provide or protect any competitive advantage of any person or concern en-

gaged in a particular type of business, it is rather the purpose of the statute to protect the individual employee and preserve for him a much needed day of rest and recreation. Without the protection of law, the individual employee falls victim of his economic status and will ultimately be required to give up his day of rest to meet the competition of those who seek economic advantage by working on a day which traditionally has been observed as a day of rest and recreation, serving the best interests of the people and business in general.

Section 3773.24 Revised Code as now effective, has a further purpose to make lawful on Sunday certain specific types of business or commercial activities which are recreational and educational in character, so that the people of this state might lawfully enjoy the full benefits of a day of rest. In this respect, the statute excepts from its regulation, recreation, sports, amusements, entertainment or exhibits, and the providing of services incidental to these activities. In the absence of specific statutory authority it has been previously held that sport or amusement is lawful. *Ex parte Neet*, 157 Mo. 527; *Territory v. Davenport*, 17 N. M. 214, 124 P. 795. The statute also excepts public and private fairs, and publicly owned places of entertainment, recreation and education, and the providing of services and commodities incidental to these activities. A further exception is provided for travelling and services and commodities incidental thereto, which recognizes the present mobility of our society and the necessity of transportation for the full utilization of Sunday. *Nagle v. Brown*, 37 Ohio St. 7. In the context of the prohibited commercial activity contained in the statute, all of these exceptions per force relate to commercial activities of this special character, all of which constitutes a reasonable classification. *McGowan v. State of Maryland*, 220 Md.

117, 151 Atl. 2d 156, Supreme Court of the United States, October Term, 1960, No. 8; *State of Connecticut v. Hurliman*, 143 Conn. 502, 123 Atl. 2d 767; *State of Connecticut v. Shuster*, 145 Conn. 554, 145 Atl. 2d 196; *People of New York v. Freedman*, 302 N. Y. 75, 96 N.E. 2d 184, Appeal to United States Supreme Court dismissed, no substantial federal question, 341 U. S. 907; *State of North Carolina v. McGee*, 327 N. C. 63, 75 S. E. 2d 783; *Two Guys From Harrison, Inc. v. Furman*, 58 N. J. Super 313, 156 Atl. 2d 56; *Carr v. State*, 175 Ind. 241, 93 N.E. 1071.

The creation of these exceptions to the general prohibition in the statute will require that a limited number of persons must work on Sundays, but such employment is in furtherance of the general welfare of the people of the state so as to fully utilize the day as one of rest and recreation. The exceptions delineate separate classes of commercial activity and contain no internal discrimination which would constitute a violation of the equal protection clause of the Fourteenth Amendment.

II

**The Ohio Statute in Question Section 3773.24 Revised Code, is not Violative of the First and Fourteenth Amendments to the Constitution of the United States as an Infringement Upon the Religious Freedom of the People of this State, nor Does it Constitute the Establishment of any Religion or Cause any Discrimination Between Persons of Different Religious Beliefs.**

The Supreme Court of Ohio has consistently held that Section 3773.24 Revised Code, and its predecessor statutes are predicated upon the proven fact that a day of rest from ordinary pursuits is requisite for the well-being, both morally and physically, of the people of this state and

that the statute in no way interferes with the freedom of religious worship or the free exercise of religious beliefs, nor was it designed to. *State of Ohio v. Kidd*, 167 Ohio St. 521, Appeal to United States Supreme Court dismissed, no substantial federal question, 358 U. S. 131; *State of Ohio v. Powell*, 58 Ohio St. 324; *Bloom v. Richards*, 2 Ohio St. 387. Certainly the Supreme Court of the United States cannot be petitioned to strike down every law which is grounded both in the general welfare of the people and religious precepts, for the very fabric of our society has interwoven moral principles of a religious origin. The Ohio statute does not force participation in any religious pursuit, and it contains an exception which clearly protects those who would conscientiously observe the seventh day of the week as their Sabbath for religious purposes. The Ohio statute clearly serves as secular a purpose and maintains the state's neutrality in religious matters, as did the transportation of school children, albeit to a Catholic school, which was upheld by the Supreme Court of the United States in *Everson v. Board of Education*, 330 U. S. 1. The Ohio statute in question is entirely dissimilar from those state statutes admittedly affecting religious freedom, the expression of religious views or religious evangelism which were held invalid in the cases of *Cantwell v. Connecticut*, 310 U. S. 296, *Murdock v. Pennsylvania*, 319 U. S. 105 and *Marsh v. Alabama*, 326 U. S. 501. The instant case is dissimilar from that of *Crown Kosher Supermarket of Massachusetts, Inc. v. Gallagher*, 176 Fed. Supp. 466, Supreme Court of the United States, October Term (1960), Docket Number 11, as the Ohio statute would except from its operations persons similar to the appellee in that case and would allow their free exercise of their religious beliefs and the normal transaction of their business.

## CONCLUSION

The Supreme Court of the United States had before it on appeal the Ohio statute as effective prior to July 17, 1959, in the case of *State of Ohio v. Kidd*, 167 Ohio St., 521 358 U. S. 131, and such appeal was dismissed as there was no substantial federal question. The essence of the statute, both before and after its amendment effective July 17, 1959, remains the same, as it contains a general prohibition against common labor on Sunday and the opening of a premises for the transaction of business, and excepts from this general prohibition, works of charity and necessity, and those who conscientiously observe the seventh day of the week as the Sabbath, and refrain from doing those things prohibited on Sunday. The only remaining question as to this statute is the construction and effect of the exceptions added by amendment effective July 17, 1959 which were not specifically considered by the Court below.

It is therefore respectfully submitted that the appellants now present no substantial question for the decision of the Supreme Court of the United States and that the judgment of the Supreme Court of Ohio is on a non-federal basis; and that the appeal should be dismissed.

Respectfully submitted,

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